United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1511

IN THE

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FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
Appellee,

vs.

CHARLES EDWARD WHITE,
Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, CR 74-270.

BRIEF FOR THE APPELLEE

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Preliminary Statement

On October 1, 1974, a criminal Complaint was filed against the defendant, Charles Edward White, charging him with a violation of Title 18, U.S.C., Section 2421 for the unlawful interstate transportation of Annette Petty and Michelle Sims in interstate commerce for the purposes of prostitution. The defendant was duly arraigned on that Complaint on October 4, 1974, and the Preliminary Hearing was scheduled for October

18, 1974. On October 7, 1974, Annette Petty was subpoenaed as a witness for the purpose of that Preliminary Hearing. On October 18, 1974, the scheduled date of that hearing, Annette Petty failed to appear as subpoenaed. Further proceedings were adjourned at that time until October 22, 1974. On the morning of October 21, 1974, the nude body of Annette Petty was discovered in a motel, and it was determined that the cause of death was strangulation.

On October 25, 1974, Federal Grand Jury in the Western District of New York returned a two-count Indictment against the defendant, charging him in Count I with prostitution, and in Count II, with obstruction of justice for the murder of Annette Petty in violation of Title 18, U.S.C., Section 1503.

Subsequent to the Federal Indictment, an Erie County Grand Jury returned an Indictment against the defendant for the murder of Annette Petty. The defendant was tried locally on those murder charges commencing in January 1976 which trial resulted in an acquittal of the defendant.

On May 17, 1976, the Federal District Court was informed by the Government that the United States Attorney's Office in the Western District of New York did not have authorization from the Attorney General to proceed on Count II, the obstruction of justice count due to Department of Justice policy that dual prosecutions are not to be maintained in both State and Federal Courts. Accordingly, the defendant's counsel made a motion to dismiss, and Count II of the Indictment was dismissed at that time.

On October 12, 1976, the trial commenced on the remaining count, the interstate transportation of females charge in front of the Honorable Charles I Brieant, Jr., United States District Judge (by designation). On October 14, 1976, the jury returned a verdict of guilty against the defendant. On October

28, 1976, the defendant was sentenced to the custody of the Attorney General for a period of 3½ years, and it is from that conviction and sentence which the defendant now appeals.

Statement of Facts

The charges against the defendant were that he on or about September 19, 1974 knowingly did transport in interstate commerce from Buffalo, New York to Erie, Pennsylvania Annette Petty and Michelle Sims for the purpose of prostitution.

Michelle Sims

In proving these charges, the Government called as its principal witness Michelle Sims. She testified that in 1974 she was a prostitute and that Charles White was her pimp. In September 1974, she was living at 39 Kingsley Street, the apartment of Alice DuBois and that Annette Petty and Charles White also stayed there (Tr. p. 59 and 60). In September, she, Annette Petty and Charles White, along with an individual by the name of James whose last name she did not know, traveled to Erie, Pennsylvania in Charles' two-tone tan Buick Electra. Prior to their leaving, Alice made the girls up and gave them wigs to wear (Tr. p. 61). They left around 9:00 o'clock, took the Thruway (Tr. p. 61) and stopped at a truck stop to get something to eat on the way (Tr. p. 63).

After they arrived at Erie, they went to State Street, and the girls got out of the car. Michelle solicited a customer and performed an act of prostitution on him in his car. Annette Petty was standing next to the car at this time. After this happened, both girls were arrested, but the girls gave the police aliases when arrested, Michelle Sims giving the name Ann Williams and Annette Petty giving the name Brenda Patterson (Tr. p. 66). When the defendant had first let the girls out of the car,

he and James were riding around the vicinity. After they were arrested, Michelle still saw them driving around in Charles' car. When they were in the police car, White drove past them, and Annette tried to get Charles' attention, but failed to do so (Tr. p. 67).

After they were arrested, Michelle had occasion to call Alice DuBois and told her that they needed somebody to get them out of jail (Tr. p. 80). The girls spent some time in jail and then Charles White, Alice DuBois and the individual named James came and bailed them out, after which they all returned to Buffalo (Tr. p. 67).

On cross-examination, it was elicited that when first questioned by the F.B.I., Michelle Sims had told them that Charles White had never pimped her in his life (Tr. p. 80). That at that time, Charles was a friend of hers, (Tr. p. 92) and that a few days later, she appeared in front of a Federal Grand Jury and also testified that Charles White had never taken her to Erie, Pennsylvania, but at the time she testified he was still a friend of hers (Tr. pp. 82 thru 85). She further testified that back when she gave those statements in 1974 she was 15 and knew that she could not be prosecuted as an adult for perjury. However, on the stand she stated that since she was 17, it was her belief that she could be prosecuted for perjury at the time of giving her trial testimony (Tr. p. 93).

Alice DuBois

As corroborating evidence, the Government called Alice DuBois who testified that Charles White was her boyfriend between June and October of 1974 and that they lived together at her apartment at 39 Kingsley. During that period, Annette Petty and Michelle Sims also lived with them (Tr. p. 21). Charles White introduced her to Annette and Michelle on or about September 17, 1974.

At approximately 7:30 P.M. on the evening of Thursday, September 19, 1974, Charles told Alice to fix the girls up because he was going to come back and get them about 9:00 or 9:30. She complied and fixed their faces with makeup and gave them wigs. Charles then came back at 9:00 or 9:30, picked the girls up and three of them left and she never saw any of them again that night.

The next time she had occasion to talk to Charles White was approximately around 3:00 A.M. the next morning over the telephone. He told her that he thought the girls had gotten arrested, and he would tell her more about it when he got back. He had returned the next afternoon.

On Saturday, Charles had told Alice that he was going to pick the girls up in Erie, Pennsylvania. She accompanied him to Erie, Pennsylvania with an individual by the name of James whose last name she did not know and that they went and bailed them out from jail (Tr. p. 27).

She further corroborated the fact that Charles had a brown Buick Electra. She also testified that prior to the evening of September 19, 1974, Charles had told her that he was thinking about taking the girls to Erie, Pennsylvania.

The Government also called Dominic DiPaolo, a member of the Erie Police Department, who was the arresting officer of Michelle Sims and Annette Petty. He testified that in the early morning hours of September 20, 1974 he was working vice in the State Street area in Erie, Pennsylvania and observed two black girls going up to different vehicles with male drivers, talking with them and leaving. He observed one of the girls get into a car with a male and drive into a parking lot and then saw the black girl disappear from view. He came closer and observed the black girl performing an oral sex act on the male. He then placed both of the black females under

arrest. They identified themselves as Ann Williams and Brenda Patterson. At that time, Officer DiPaolo placed the girls in a police car and was taking them back to the Erie Police Department when the girl who identified herself as Brenda Patterson asked him if he would stop because she was waiting for her man to come by. At approximately this time, Detective DiPaolo observed a brown Buick Electra with a New York registration driving around in the area with a black male driver and a black passenger (Tr. pp. 97 and 98). Detective DiPaolo also identified photographs of the two girls he had arrested that night which were later established to be photographs of Annette Petty and Michelle Sims.

Lester S. Skinner

He testified that he was an F.B.I. Agent and on October 2 and 7, he interviewed Annette Petty regarding her trip to Erie, Pennsylvania, (Tr. pp. 121 and 126), and the second interview was reduced to writing.

She told him that on September 19, 1974, she along with Michelle Sims, Charles White and a third individual by the name of James went to Erie, Pennsylvania in White's brown Buick. The arrived in Erie approximately twelve o'clock midnight and that they were let out of the car. Then after they got out of the car, Charles White and James, last name unknown, went down the street and parked the car, and she, along with Michelle Sims, hung around for approximately fifteen minutes. A white male driving a yellow Duster talked to Michelle Sims, and she said she saw Michelle Sims get in the car with this white male, and she saw Michelle Sims perform oral sex on this particular white male. After Michelle Sims got out of the car, they had come across the street, and they were arrested by the Erie, Pennsylvania Police Department (Tr. pp. 128 and 129).

POINT I

The statements of Annette Petty clearly come within the statements against penal interest exception to the Hearsay Rule of 804(b)(3) and also the General Exception of 804(b)(5).

Statement Against Penal Interest—Rule 804(b)(3)

In ruling that a hearsay statement comes within the exception of Federal Rule of Evidence, 804(b)(3), Title 28, United States Code, the Trial Judge must determine that the declarant's statements so far tended to subject her to criminal liability that a reasonable person in her position would not have made the statement unless she believed it to be true.

In making this determination, the Court may consider all the circumstances under which the statements were made. This includes a consideration of all the matters admitted in the statement as well as the circumstances under which it was made.

In this case, there were two statements given by Annette Petty to Special Agents of the F.B.I. The first statement was at the Buffalo, New York Police Department on October 1, 1974 and was given to two F.B.I. Agents. At that time, she was given an Advice of Rights form which she read, stated she understood and signed (Tr. p. 121). She stated that in September of 1974, she went to Erie, Pennsylvania with Michelle Sims and Charles White and further stated that the purpose of the trip was for prostitution (Tr. p. 123) and at that time she was arrested by the Erie Police (Tr. p. 124).

The second interview was on October 7, 1974. She again gave a statement to two agents of the F.B.I. However, this statement was given at her home when her mother was at

home. Again at the outset, the Agents advised her of her rights which she read and stated she understood and again signed a separate Advice of Rights form (Tr. p. 125). However, this interview was reduced to writing in her presence which she was asked to read at the end of the interview and sign which she did (Tr. p. 126). A copy of that signed statement is attached in Appellee's Appendix, pages 1a thru 5a.

In that signed statement, Annette Petty makes three statements which are clearly against her penal interest.

First, she clearly admits that she is a prostitute and that the purpose of the trip to Erie, Pennsylvania was for the purpose of prostitution. This in conjunction with the fact that she was arrested in Erie, Pennsylvania on prostitution charges less than three weeks prior to the time she gave the statement is clearly against her penal interest.

Secondly, proof at the time of the trial clearly showed that Annette Petty was arrested in Erie, Pennsylvania and that she had given a false name to the police as Brenda Patterson. In her statement, she admits that she was one of the girls arrested in Erie, Pennsylvania. This clearly provides a link between her and Brenda Patterson, the alias she used in Erie, Pennsylvania, a link which would have led to her apprehension for the charges brought against her in Erie and again is against her penal interest.

Finally, in that statement she states that on Sunday, September 22, 1974, after arriving back in Buffalo, Charles White took them to a truck stop on Michigan Avenue to work as prostitutes. That although they didn't "turn any tricks" at that time, they did steal a woman's purse by Michelle pushing the woman and Annette grabbing the purse. Further, it is stated therein that the purse had $25.00 in it which they gave to

Charles White. This is another statement against her penal interest.

In *United States vs. Dovico,* 380 F.2d 235, 237 (2nd Cir. 1967), *cert. denied,* 389 U.S. 944 (1967), this Court stated that under penal interest exception there must be statements admitting a particular crime for which prostitution is possible at the time. At the time Annette Petty had made these statements, she had already been arrested for prostitution and clearly could have been prosecuted for the purse snatching. Her situation at the time of admission was not such that there was only a remote risk of prosecution.

The defendant maintains that Annette Petty's statements were not against her penal interest since "she had virtual immunity from prosecution because of her status as a key government witness." (Defendant's Brief, page 8).

This was not the case. The record is clear that at the time she made these statements, Annette Petty was aware that she was not immune from prosecution. She knew that she was talking with Agents of the F.B.I. both on October 1, 1974 and October 7, 1974 and on both occasions, she had been advised of her rights by Special Agent Skinner which includes the statement that "anything you say can be used against you in Court." In addition, it is clearly stated in her signed written statement that "no promises...have been made to me...."

It is further clear from the testimony of Special Agent Lester Skinner that when he had taken the statement from Annette Petty that she was not granted "virtual immunity" because of her status as a witness. Special Agent Skinner testified that she was not an object of the Federal investigation because she had committed no Federal crime and that he informed her that he wanted her to be a witness. The only promise made to her was that if she cooperated this in-

formation would be made known to the United States Attorney's office, a branch of the Government with which she was not in any trouble with in the first place (Tr. p. 132). Other than that, there were no representations as to talking to any juvenile authorities or anybody else.

Clearly the recitation in the advice of rights that anything she said could be used against her demonstrates she did not have any basis to believe that she was granted "virtual immunity" as the defense contends.

Defendant further maintained that Petty's statements were not against her penal interest since "none of the conduct to which Miss Petty admits in a reduced statement (as was allowed before the jury) is criminal."

"However, a Trial Judge is not to be limited to a reduced statement when making a preliminary evidentiary ruling with respect to declarations against interest; he is to look at all the evidence before him to determine whether the statement is trustworthy." *United States vs. Bagley,* 537 F.2d 162 (5th Cir. 1976). Although *Bagley* involved the exclusion of a hearsay statement, the Court interpreted Rule 804(b)(3) to allow the trial judge to consider all the evidence before him and to exercise discretion in determining whether he is satisfied that the statement is trustworthy. *U.S. vs. Bagley, supra,* at 168.

Rule 804(b) reads that statement against interest are "not excluded" by the hearsay rule. The Trial Judge must first look at the entire statement in order to determine whether the statement is against the declarant's penal interest, and then, secondarily determine whether the entire statement, or only portions of the statement, are to be admitted into evidence, considering such factors as relevancy and prejudice.

The appellant cites *United States vs. Marquez,* 462 F.2d 893 (2nd Cir. 1972) and *United States vs. Seyfried,* 435 F.2d 696

(7th Cir. 1970) for the proposition that where a statement is clearly separable, part of which is against one's interest and part is not, only that part which is against one's interest, and, therefore, has some inherent trustworthiness should be admitted. However, both of those cases are clearly distinguishable from the one now before this Court. In both of these cases, the defendants had made statements admitting the crimes they were charged with and going further to accept all liability for those crimes in order to exculpate their co-defendants. In *Marquez,* a narcotics case, the defendant making the statement was the one caught with the drugs in his possession and was sure of being convicted. In *Seyfried,* the defendant making the statement had already pled to the bank robbery in question. The holdings of those courts were that the exculpatory portions were too untrustworthy, and, therefore, should be severed, from the portion which was a statement against interest.

It should be noted that Rule 804(b)(3) does not require that a statement be corroborated by other evidence unless it is a statement tending "to expose the declarant to criminal liability and offered to exculpate the accused." The exact situations as were present in *Marquez* and *Seyfried, supra.*

In the case now before this Court, every word of the hearsay statement which was admitted was corroborated one hundred percent by the testimony which preceded it at the trial. Accordingly, there was not the same element of untrustworthiness as was present in *Marquez* and *Seyfried,* and Annette Petty's statement was not of the exculpatory nature rejected in those cases.

In *United States vs. Barrett,* 539 F.2d 244 (1st Cir. 1976), the First Circuit Court of Appeals considered the question of what treatment to give portions of a statement against in-

terest. The issue was whether collateral portions could be admitted along with that portion specifically against interest. The Court said at page 253 that if the collateral remark was "sufficiently integral to the entire statement, and the latter sufficiently against interest", it fell within Rule 804(b)(3) and was admissible. Implicit in all of these cases is that the Trial Judge consider the entire statement and the circumstances under which it was given and not only a redacted statement in determining whether a portion of the statement is admissible as being against penal interest.

Barrett also holds at page 251 that such statements do not have to be clear-cut confession under the rule but are sufficiently against interest if they would be important evidence against the declarant if he were himself on trial. The statements of Annette Petty that she was a prostitute and went to Erie, Pennsylvania for the purposes of prostitution would meet this standard if she were tried on the prostitution charges she was arrested on.

The weight of Annette Petty's admissions as statements against her interest is not greatly diminished by the New York rule in regard to uncorroborated confessions (Defendant's Brief, p. 10). Petty admitted participation in prostitution less than two weeks after her arrest and her statement contains sufficient detail and is sufficiently corroborated by other witnesses two years later so as to indicate its reliability and trustworthiness to the satisfaction of Judge Brieant. Therefore, Annette Petty's statement were properly admitted into evidence as declarations against her penal interest.

Statement Admissible as an Other Exception—Rule 804(b)(5).

Rule 804(b)(5) provides in pertinent part that:

> "A statement not specificially covered by any of the foregoing exceptions but having equivalent circumstantial

> guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

First, that the statement be offered as evidence of a material fact is obvious and this is not contested by the appellant (Appellant's Brief, p. 14).

Second, the statement offered into evidence must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." In view of the defendant's attack on the credibility of Michelle Sims and Alice DuBois and his attempt to characterize their testimony as fabricated, the statements of Annette Petty acquire a great deal of probity. It serves to solidify the testimonies of Sims and DuBois and establishes the durability of the facts over a period of two years. These statements were offered into evidence for the purpose of corroborating the other evidence in the case. The most probative evidence of the fact that Annette Petty was a prostitute, that she went to Erie, Pennsylvania for the purposes of prostitution and that Charles White took her there were her own statements. Furthermore, this was the most probative and best evidence which the Government had available to corroborate the testimony of the other witnesses.

Although there was evidence that James (Garrett) was on the trip, the girls did not know his last name and there is no indication that he knew what the purpose of the trip was for or that Annette Petty was a prostitute. Furthermore, Garrett's presence was unavailable to the government (Tr. p. 170-1).

The statements of Annette Petty also have a high guaranty of trustworthiness as required by the rule. Petty's statement was made two weeks after the events occurred so she could not have fabricated that fact. Petty's statement is completely corroborated by the testimony of Alice DuBois and Michelle Sims. All three identify Charles White as the man who intended that Petty and Sims go to Erie, Pennsylvania for purposes of prostitution, and who transported Petty and Sims to Erie for that purpose. All three identify White's car as the brown Buick Electra and Officer DiPaolo said he saw a brown Buick Electra with New York plates occupied by two black males when he arrested the girls. Further, the fact that the statement was given on two occasions to F.B.I. agents in spite of an advice of rights and was reduced to writing and signed also bolster the trustworthiness of that statement. Corroboration in such detail is sufficient to guarantee the trustworthiness of Petty's statement. It is unlikely that Sims and DuBois remembered in detail a story supposedly fabricated by Annette Petty two years earlier if it were not true.

Appellant also contends that he was given insufficient notice of the Government's intent to use the statement.

Rule 804(b)(5)(C) requires that there be ample notice of the intention to offer the hearsay statement into evidence. Defendant's counsel in this case was assigned as defendant's counsel in October of 1974. The contents of Petty's statements were set forth in the affidavit supporting the Complaint filed on October 1, 1974. Therefore, he was aware of the statements for two years.

Defense counsel was served with the Government's Notice of Intention to use the hearsay statements of Annette Petty on October 5, 1976. Trial commenced on October 12, 1976 and the statement was admitted into evidence on October 13,

1976. In *United States vs. Iaconetti,* 406 F.Supp. 554, 560 (EDNY 1976) notice of five days was deemed sufficient even when such notice was given *during* the trial.

It is argued that the materiality of the statement was outweighed by its unfair prejudice to the defendant, and thus should have been excluded. Federal Rules of Evidence, Rule 403 (Defendant's Brief, p. 14). A similar argument was made by the defendant in *United States vs. Iaconetti, supra.* There, the Court considered prejudice in terms of surprise and emotional impact on the jury. At 557. In these terms, there was little, if any, prejudicial effect on the defendant in this case. The admission of Petty's statement was severely restricted by Judge Brieant, and was limited to repetition of the testimony of Michelle Sims. The emotional impact of introducing the statement of a dead witness was negligible since the jury had been amply warned of the nature of this evidence. The evidence was no surprise to the jury since it merely confirmed testimony about the defendant they had already heard.

Appellant contends that because the statement was admitted it had to be revealed to the jury that Annette Petty was deceased at the time of trial and that this would provide the link between her death and the defendant. Supposing, however, that the statement were not offered and her death were not revealed to the jury but that her name came in due to it being set forth in the indictment and through the testimony of the other witnesses. Then you may very well have a situation where the jurors would wonder why Annette Petty was never called as a witness and ponder on her absence. This could just as easily have triggered some of the jurors recollection. Accordingly, the actual prejudice to the defendant by revealing to the jury that Annette Petty was deceased is highly speculative.

Accordingly, there was no error in Judge Brieant admitting the hearsay statements under the Rule 804(b)(5) exception.

POINT II

The admission into evidence of Annette Petty's hearsay statement does not violate the confrontation clause of the Sixth Amendment since it possesses sufficient "indicia of reliability" and is not "crucial or devastating".

Prior decisions of the United States Supreme Court and of this Court which have dealt with the Sixth Amendment's right of confrontation maintain that the confrontation clause cannot be read as an absolute bar to the admission of hearsay evidence. *California v. Green*, 399 U.S. 149 (1970); *Dutton vs. Evans*, 400 U.S. 74 (1970); *United States vs. Puco*, 476 F.2d 1099 (2nd Cir. 1973). The United States Supreme Court has been careful not to place the confrontation clause in direct conflict with the law of evidence:

> While it may readily be conceded that hearsay rules and a Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true; merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied. *California vs. Green, supra,* at 155-156.

Whether the admission of hearsay evidence under a recognized hearsay exception is a violation of the Confrontation Clause must be determined on a case-by-case basis (*Dutton vs. Evans, supra,* at 86; *United States vs. Puco, supra,* at 1103; *United States vs. Kelley,* 526 F.2d 615, 620 (8th Cir. 1975)) through an evaluation of the particular evidence in light of the circumstance of the case and the purposes of the confrontation clause. *Dutton vs. Evans, supra,* at 83-90.

In *Dutton vs. Evans, supra,* at 89, Justice Stewart stated in his opinion:

> The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement. *California vs. Green,* 399 U.S. 149, 161 (1970).

The admission of a hearsay statement satisfies the purpose of the confrontation clause when three conditions are met:

> (1) There are "indicia of reliability" surrounding the evidence;
>
> (2) The evidence in "peripheral" rather than "crucial" or "devasting"; and
>
> (3) The witness is equally available to the prosecution and the defense. *United States vs. Yates,* 324 F.2d 1283, 1286 (D.C. Cir. 1975).

In the instant case, the witness who made the hearsay statement is dead and is not available to the prosecution and the defense. However, this fact should not be construed as a failure to meet one of the stated conditions, thereby requiring reversal. The precise contours of these three requirements are not free from doubt, nor is it certain whether all three must

be satisfied in every case. *United States vs. Yates, supra,* at 1286. Where a state's witness is bona fide unavailable, the requirements of the Confrontation Clause are met when prior recorded testimony of the witness is admitted . . . if that prior testimony bears "indicia of reliability" . . . *Mancusi vs. Stubbs,* 408 U.S. 204 (1972). Certainly, if the Government could have produced Annette Petty as a witness, it would have. This is not a case where the Government did not make a good faith effort to produce the declarant as a witness. (*Bruton vs. United States,* 391 U.S. 123, (1968); *Barber vs. Page,* 390 U.S. 719 (1968), nor where the Government intentionally withheld a witness.

The statement of Annette Petty possesses indicia of reliability in accordance with *Dutton vs. Evans, supra,* 88-89. The statement was made less than two weeks after the events described. The possibility that it was based on faulty recollection was remote. The statement was not ambiguous, but was detailed, and was corroborated by, and in turn corroborated, in detail the testimony of the other witnesses called by the prosecution. Annette Petty had personal knowledge of the identity and role played by the defendant since she was present when the events occurred and she had a previous relationship with him. These facts were also corroborated. Her statement was against her penal interests. She admitted she was a prostitute and had been soliciting. It was a statement made voluntarily and made in full knowledge that anything she said could be used against her. The indicia of reliability present here are sufficient to disprove the possibility that Annette Petty's statements would have been discredited on cross-examination, had she been available as a witness, to the extent that an acquittal would have resulted at trial. *U. S. v. Kelley,* 526 F.2d 615, 621 (8th Cir. 1975).

That only certain portions of Annette Petty's statement were admitted in order to guard against prejudice to the defendant and that her statement was merely repetitious of other evidence already presented in the case, *i.e.* the testimony of Michelle Sims, Alice DuBois, and Dominick DiPaolo, indicate the admission of the statement was "peripheral" and not "crucial or devastating". This case does not involve prosecutorial misconduct as did *Pointer v. Texas,* 380 U.S. 400 (1965). [Use of a statement given at preliminary hearing inculpating defendant who did not have a lawyer at the hearing and who did not try to cross-examine the declarant held violative of Sixth Amendment]; and *Douglas v. Alabama,* 380 U.S. 415 (1965), [Reading of entire document purporting to be an accomplice's written confession after the accomplice had refused to testify in reliance upon his privilege against compulsory self-incrimination]. *See also,* discussion of these cases in *Dutton v. Evans, supra,* 84-87.

Here, the use of the hearsay statement did not make an otherwise weak case strong. *United States v. Puco, supra,* at 1104. The evidence was not "essential" to the prosecution's case: The statement was admitted in a very diluted form and the jury had heard ample testimony for conviction. In addition, the hearsay statement possessed indicia of reliability to insure its trustworthiness to the jury, and thus, its admission did not violate the defendant's right to confrontation. Thus, a reversal on the basis of defendant's contended violation of this right is not warranted.

POINT III

There was no error in the Court's refusal to poll the jury as to whether they had read a newspaper article which appeared during the course of the trial.

On October 12, 1976, the jury was empaneled, opening statements were given and proof was begun. The "prejudicial" argument of which the appellant desired the Court to poll the jury as appeared in the morning paper on October 13, 1976.

On *October 12, 1976* after the jury was empaneled at approximately 3:00 P.M., the Court gave a recess for approximately 15 minutes. Prior to taking that recess, the Court gave the jury detailed instructions, including, *inter alia,* that it was to decide the case solely on the basis of the evidence presented and that the jurors were not to discuss the case with each other or any other person including the following instruction:

> And finally you shouldn't *read any newspaper stories* or listen to any radio or television accounts of the trial or any other proceedings in this case, or anything affecting the subject matter of this case which may have a tendency to advise you in any way.
>
> Now these are all very important instructions, and I expect you to adhere to them. Keep an open mind and do not allow yourself to be affected in any way by receiving something which is not part of the trial. (Emphasis Added). (Tr. pp. 18, 19).

Proceedings resumed at approximately 3:30 P.M. that afternoon, at which time opening statements were made and the Government's first witness was examined. At approximately 4:50 P.M. that afternoon, the Court adjourned for the day. However, prior to the jury leaving the court room, the Court again gave detailed instructions to the jury as follows:

> . . . And you know between now and then you are not to discuss this case to each other or to anyone else. *You are not to read or hear any news or anything like that that might have any bearing about the case,* about the general subject matter of any kind. *Anything that appears in the news is pure hearsay anyway. It has no evidentiary value whatever.* You are to stay clear of that. Keep an open mind until you have heard all the evidence in this case. You may now withdraw from the court room for the day. (Emphasis Added). (Tr. p. 40).

Accordingly, the Court had given the jury very definite and forceful instructions not to read newspaper articles regarding this case twice within a two-hour period in the late afternoon of October 12, 1974.

There is a presumption that unless there is evidence clearly indicating otherwise that the jury understood and followed the Court's instructions. *United States vs. Kaplan,* 510 F.2d 606 (2nd Cir. 1975); *United States vs. Sporano,* 422 F.2d 1095 (2nd Cir. 1970).

Furthermore, there must be a showing of a violation to put this presumption in doubt. *United States vs. Kellerman,* 431 F.2d 319 (2nd Cir. 1970), *cert. denied,* 400 U.S. 957 (1970). In a case similar to the one now before this Court, it has been held that it is presumed the jurors did not violate the Court's admonition not to read any newspaper articles relative to the trial. *Estes vs. United States,* 335 F.2d 609 (5th Cir. 1964). There must be a showing of a violation to put this presumption in doubt. There was no such showing in this case.

The fact that two jurors came forward does not set about to rebut this presumption. Both jurors indicated that their memories were stirred by testimony within the Court not by any newspaper article. Juror Hartman came forth on the afternoon of October 12, 1974 before the newspaper article even appeared the next morning (Tr. p. 41). And Juror Resler

clearly stated to the Court that his memory of a girl having died in connection with prostitution came from the proceedings what happened in the court room the day before and at no time stated or hinted that he violated the Court's instructions and looked at a newspaper (Tr. pp. 51 and 54). Therefore, the fact that these two jurors came forward does not constitute any indication of a violation of the Court's instructions. Judge Brieant was correct in his ruling, stating that there was ". . . no basis to assume that any of our jurors had violated my instructions" (Tr. p. 55).

It is important to note in passing that even if there were an indication of a violation by one or more of the jurors, which there is not in this case, even under those circumstances a violation would not be considered per se prejudicial to the defendant in that the burden is upon the defense to show that prejudice resulted. *United States vs. Brasw,* 516 F.2d 816, (2nd Cir. 1975), *cert. denied,* 423 U.S. 860 (1975).

In order to rebutt the presumption that the jury followed the Court's instructions, the defense has the burden to show that not only that prejudice resulted but that such publicity was "highly prejudicial."

In *United States vs. Persico,* 425 F.2d 1375 (2nd Cir. 1970), the Court held that a jury is assumed to be equal to the task of basing its verdict only on the evidence, except when the publicity is so prejudicial that a mistrial is the only avenue open. In that case, the publicity was so widespread the Court found it necessary to inquire separately of each of the jurors in that it consisted of articles in all the New York newspapers and stories on New York radio and television broadcasts. In that case, it would have been almost impossible to prevent the jury from hearing that publicity. Short of sequestration, it would have been highly improbable that the jury would not

have been aware of the publicity. In the case now before the Court, we are dealing with a completely different situation in that the article on the White trial was a single, column article on the bottom of a back page in a newspaper (Tr. p. 55).

Furthermore, the publicity in the cases cited in the defendant's brief was significantly greater and more prejudicial than that which was present in this case. In *United States vs. Concepcion Cueto,* 515 F.2d 160 (1st Cir. 1975), newspaper articles recited that the defendant was considered one of the most important and most dangerous drug dealers and that the defendant had fled from two previous attempts to arrest him and engaged in a shoot out, that story, having been published immediately preceding closing arguments. The Court there found the article highly prejudicial because of its contents and the fact that it occurred at a crucial moment in the trial. The Court further went on to state at page 164 that the problem in that case was in large measure outside of the Court's control and that the best defensive weapon against such publicity other than sequestration *"is a strong anticipatory warning prior to trial in cases . . . which such stories are likely to erupt,"* these were exactly the measures taken by Judge Brieant prior to the publication of the article in question.

Similarly, *United States vs. Hankish,* 502 F.2d 71 (4th Cir. 1974) involved a highly prejudicial newspaper article referring to the defendant as a racketeer and director of a multi-state theft ring. Also of significance it does not appear that the jurors were instructed prior to the time that article appeared in the newspaper.

In *United States vs. Spinella,* 506 F.2d 426 (5th Cir. 1975), *cert. denied,* 423 U.S. 917 (1975) did not involve publicity about the case, but rather two jurors receiving threatening phone calls during the course of the trial, and it was on that

basis that the Court held there was a duty to inquire into the character of the potentially prejudicial material which is clearly distinguishable.

The strongest case cited by the defense is *United States vs. Pomponio,* 517 F.2d 460 (4th Cir. 1975), *cert. denied,* 423 U.S. 1015. In the *Pomponio* case, there were two newspaper articles containing highly prejudicial information about the defendant in that it revealed two co-defendants refused to testify on his behalf, that the trial was for only the first 10 of 113 counts, and also in the article there was a comparison between the trial and trying Al Capone. Furthermore, in these articles, the case was clearly identified in the headlines of those articles. In *Pomponio,* the Court relied on the previous admonitions to the jury, refused to inquire further of them. On appeal, the Court conceded that the jury is presumed to follow the trial Court's instructions. However, due to the highly prejudicial and prominent nature of the information, the Judge should have inquired of the jurors. The article about the White trial was much less prominent and much less prejudicial. Here we have a single newspaper article, approximately six inches long, appearing at the bottom of the back page of a newspaper. The first four paragraphs of that article simply state that which the jury already knew as having happened before them in Court the previous day. The fifth paragraph states in a single sentence the fact that Annette Petty was strangled in 1974. The sixth paragraph goes on to state that White was accused of the murder but was "found innocent" of it in State Supreme Court. The remaining two paragraphs also clearly state facts which already would have been known to the jurors.

Perhaps the best indication of the insignificance of the article were the comments that Judge Brieant made when this matter was first brought to his attention.

> I bought the newspaper this morning and I had it at breakfast. And I didn't pick it up. There was a relatively small article at the bottom of the page there and I really didn't see it and I would have been interested to see it. If there were any reasons to believe that they were looking at the paper, of course, I would ask if anybody read it (Tr. p. 56).

Although Mr. Bermingham brought to the Court's attention that the headline would not necessary alert the jurors to the fact that this article was about the trial they were sitting on, the Court responded:

> The second line says: "Charles E. White." The first sentence is entirely a matter of the Court record. You don't get into any trouble with the article until you get down to the bottom part of it where it says that he was accused of a murder and found innocent. And I presume that the jurors would believe that if he was found innocent, he was innocent, they certainly should believe that (Tr. p. 57).

Accordingly, even in the Judge's own estimation that if a juror had ignored his prior admonitions about reading the newpaper that in the event a juror happened to have read the article, it was not highly prejudicial. They stated matter of factly that Miss Petty was found strangled in a motel room in 1974. The defendant was accused and tried for her murder, and he was "found innocent". Which according to the content of the article, there was no reason to believe that the defendant was other than innocent for that murder.

In the *Hankish* opinion, *supra,* at page 77, it is stated that "unless there is substantial reason to fear prejudice, the Trial Judge may decline to question jurors." There was no "substantial reason to fear prejudice in this case. The jury had been admonished twice prior to the article appearing in

the newspaper and there was no indication whatsoever that any of the jurors had seen the article.

In *United States ex rel. Monty vs. McQuillan,* 385 F.Supp. 1308 (DCNY 1974), "the question whether . . . (the court) should have pooled the jury with respect to whether they had read certain news articles is a matter clearly within the discretion of the Trial Court." See also *Holt vs. United States,* 218 U.S. 245, "The Trial Judge has broad discretion in determining whether prejudice has resulted." And under *Marshal vs. United States,* 360 U.S. 310 (1959) before the Court must question the jury, it must first exercise its discretion to determine whether a "serious question" of possible prejudice exists.

As noted above, Judge Brieant clearly considered his prior instructions to stay away from the newspapers, the unobtrusive positioning of the article in the newspaper, and the fact that there was no indication whatsoever that any of the jurors had read the article as the basis of his ruling and there was no abuse of discretion. His refusal was not error.

Conclusion

For the reasons stated above, the appellant's conviction should in all respects be affirmed.

Respectfully submitted,

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
502 U.S. Court House,
Buffalo, New York 14202,

RICHARD E. MELLENGER,
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Of Counsel,
Attorneys for Appellee.

APPENDIX.

Statement of Annette Petty
Dated October 7, 1974.

Buffalo, N. Y.
10/7/74

A.P.
I, Annette Petty, age 15, make the following voluntary ~~A.P.~~ statement to Special Agents Lester S. Skinner and Phyllis MacLean who have identified themselves as Special Agents of the F.B.I. assigned to the Buffalo, N.Y. Office. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

I was born March 19, 1959 at Buffalo, N.Y. and have completed the 9th grade. I can read and write the English language.

I ~~met~~ A.P. Charles Edward White approximately four months ago in the King and Queen Bar on Jefferson Ave., Buffalo, N.Y. I did not see White again until about September 14, 1974 when he picked A.P. up me and Michelle Sims on Delavan St. White was driving his 1973 Brown Beach ~~and stopped to the project where he presently~~

A.P.

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Statement of Annette Petty
Dated October 7, 1974.
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AP "THC" "THC" AP "THC" AP
~~"THC". I know that THC is a drug, and it makes you high.~~

Charles White then drove AP me and Michelle Sims to 39 Kingsley Ave. where we met Alice DuBois. Charles White then told DuBois to dress me and Michelle Sims which DuBois did. Charles White then took me and Michelle Sims to a truck-stop on Michigan Ave. ~~in order to prostitute me and Michelle Sims.~~ At the truck-stop we did not turn any tricks "since no one approached us."

On Thursday, September AP 19, 1974 myself, Michelle Sims and Charles White were at 39 Kingsley Ave., Buffalo, N.Y. and Charles White told Alice DuBois to dress me and Michelle Sims. After DuBois dressed me and Michelle Sims, Charles White drove us to Jefferson and Best St. where we met James (FNU). Charles White told us that James (FNU) was his brother.

Charles White and James (FNU) then drove us to Erie, Pa. on AP

Statement of Annette Petty
Dated October 7, 1974.

AP

White's 1973 Brown Buick ~~for the purpose of prostituting me and Michelle Sims in Erie, Pa.~~

We arrived in Erie, Pa. at approximately 12:00 midnight where we went to the Holiday Inn on Peach St., Erie Pa. Charles White and James (FNU) then let us out of the car ~~so that we could go to work prostituting ourselves~~. Charles White and James (FNU) then pulled down the street and parked on the side of the street.

Myself and Michelle Sims stayed on Peach St. for approximately 15 minutes when a white male driving a yellow duster called Michelle Sims over to the car. I saw Michelle Sims get in the car with this white male and they drove into the Holiday Inn Parking lot. I walked over to where they were parked and I saw Michelle Sims performing a "blow job" on this white male. After I saw what Michelle Sims was doing I then walked back across the street.

AP

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Statement of Annette Petty
Dated October 7, 1974.
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When Michelle Sims got out of the yellow Duster and walked back across the street, two Erie, Pa. policemen, driving a beige Cadillac, arrested me and Michelle Sims and charged us with prostitution.

On Sunday, September 22, 1974 Charles White posted $60.00 bail for me and Michelle Sims in order to bring us back to Buffalo, N.Y. to prostitute me and Michelle Sims.

As we were leaving the jail, Michelle Sims told Charles White that she only made $15.00 before we were arrested at which time I saw her give him this $15.00. Charles White then drove me, Michelle Sims, James (INK) and Alice DuBois back to Buffalo, N.Y. in his 1973 Brown Buick.

Upon arrival back in Buffalo, N.Y. Charles White took me and Michelle Sims to the truck-stop on Michigan ~~to prostitute me and Michelle Sims. He said Michelle Sims did not from ~~and~~ bring back~~ "But we did

5a

Statement of Annette Petty
Dated October 7, 1974.

steal a woman's purse. Michelle Simmons pushed this woman and I grabbed her purse. This purse had $25.00 which I gave to Charles White.

~~Charles White, since returning from Erie, Pa. has beat me on at least four occasions in order to get me to prostitute myself for him. On at least one occasion he used my hands to beat me. The last time Charles White beat me was on Monday, September 30, 1974 which was on Main St., Buffalo, N.Y.~~

I Annette Petty have read the above statement AP consisting this page and four other pages.

I have initialed all corrections and it is true to the best of my knowledge

Annette Petty

10/7/74

SA Peter S. Skinner, FBI, Buffalo, N.Y., 10/7/74.

SA Phyllis K. MacLean, FBI, Buffalo, N.Y. 10/7/74

Newspaper Item.

Jury Hears Testimony In Vice Case

A Federal Court jury was told on Tuesday that Charles E. White transported the late Annette Petty and another young girl from Buffalo to Erie, Pa., in 1974 for the purpose of prostitution.

White, 35, of 633 E. Utica St., is charged with interstate transportation of two minors for the purpose of promoting prostitution.

Asst. U.S. Atty. Richard E. Mellenger told the three-man, nine-woman jury that when the two minors arrived in Erie, they were arrested and later bailed out of jail by White.

Strangled in 1974

Mellenger stated that Miss Petty is now dead, but he was barred from disclosing the details of her death.

Miss Petty, a 15-year-old East Side girl, was strangled to death in a Town of Tonawanda motel room in October 1974.

White was accused of her murder and was found innocent in State Supreme Court earlier this year. Authorities said at his murder trial that he wanted to keep Miss Petty from testifying in the Federal Court prostitution case.

In the current case, the key witness is expected to be Miss Michele Sims, now 17, who the government contends accompanied Miss Petty and White to Pennsylvania in September 1974.

White is represented by Joseph D. Bermingham Jr., in the trial before visiting Judge Charles E. Brieant Jr.

AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A. vs Charles Edward White

State of New York)
County of Genesee) ss.:
City of Batavia)

No. 76-1511

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 28th day of February, 19 77 I mailed ___ copies of a printed Appellee Brief in the above case, in a sealed postpaid wrapper, to:

10 copies (by Air Mail) to: A. Daniel Fusaro, Clerk
United States Court of Appeals, Second Circuit
New Federal Court House
Foley Square
New York, New York 10007

2 copies to: Doyle, DieBold, Bermingham, Gorman & Brown
Att: Joseph D. Bermingham, Jr., Esq.
1340 Statler Hilton Hotel
Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Richard J. Arcara, U.S. Attorney, Att: Richard E. Mellenger, Asst. U.S. Atty.
502 U.S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this
28th day of February, 19 77

Patricia A Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77